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IN THE

Supreme Court of the United States

OCTOBER TERM 1940

BAKERY AND PASTRY DRIVERS AND HELPERS LOCAL 802 OF
THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, PETER
SULLIVAN, individually and as President of the said
Union, PADDY SULLIVAN, individually and as an officer
of the said Union, and HYMAN BERNSTEIN, individually
and as business agent of said Union, all of 265 West
14th Street, New York City,

Petitioners,

against

HYMAN WOHL and LOUIS PLATZMAN,

Respondents.

BRIEF IN OPPOSITION TO RESPONDENTS' APPLICATION FOR REHEARING

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I. The Question Presented.

In the case at bar, this Court granted the petitioners' application for a writ of certiorari, and upon granting such writ unanimously reversed the judgment of the Court of Appeals of the State of New York (No. 901, October Term, 1940; decided June 2, 1941).

The judgment in question upheld the blanket injunction of the Trial Court, which absolutely enjoined the petitioners' labor union activities ~~constituting~~ solely of the admittedly peaceful, orderly and truthful publicizing of a labor dispute.

constituting

The acknowledged object of the activities aforesaid was to protect the Union against the impairment of its established scale of wages and standard of working conditions caused by the maintenance and extension of the peddler system.

The peddler system has been adequately described in the findings of fact of the Trial Court (R. 50-54), and has been discussed at length in the brief submitted by the petitioners upon their application for the writ of *certiorari* herein. Accordingly, we shall not burden the Court with reiteration of the facts here, but respectfully direct the Court's attention to the statement and discussion of the facts contained in the original petition and brief in support thereof.

In brief summary, however, it may be well to note here that, as found by the Trial Court, the peddler system is an arrangement whereby wholesale manufacturers of bakery products, instead of engaging regular employees to distribute their products, effect distribution through individuals known as peddlers who resell the products to retail dealers and consumers. Such peddlers are utterly unregulated and unorganized, are economically dependent upon the wholesalers and, in order to earn a bare subsistence, work seven days per week without respite (R. 56). Technically ostracized from the category of employees, despite their economic subservience, the peddlers are not covered by Workmen's Compensation, Social Security, or Unemployment Insurance statutes (R. 53). The menace to society at large and to the established standards of the bakery drivers' union, in particular, is obvious. Because of the increase in the number of peddlers in recent years and the corresponding discharge of regular union employees, the petitioners sought to organize the peddlers and to improve the working conditions of the industry by persuading the peddlers to work only six days per week and to engage union employees as relief drivers one day per week (R. 52-53). Both of the plaintiff peddlers, Hy-

man Wohl and Louis Platzman, had previously applied for membership in the defendant Union, and Platzman had become a member, but was delinquent in the payment of his dues (R. 52-53, 149-151). Such was admittedly the direct and substantial economic interest which motivated the Union's activities in the case at bar.

It is recklessly and incorrectly alleged in the respondents' petition for rehearing that the activities of the petitioners in question were not actually directed against the peddler system, but that reference to the evils of the peddler system was merely an afterthought. In answer to this unfounded charge, we need merely point to the findings of fact of the Trial Court which described the peddler system and the effect thereof upon the Union in great detail (R. 50-54). It may also be noted that the language of the placards displayed by the Union was as follows:

"HYMAN WOHL

A bakery route driver works seven days a week. We ask employment for a union relief man for one day. Help us spread employment & maintain a union wage hours and condition

**BAKERY & PASTRY DRIVERS & HELPERS
LOCAL 802 I. B. of T. affiliated with A. F. L."**

(R. 57).

The absolute injunction granted by the Trial Court and upheld by the New York Court of Appeals was reversed by this Court upon the authority of *American Federation of Labor v. Swing* (No. 56, October Term, 1940), wherein the Court plainly held that the Constitutional guarantee of freedom of discussion may not be infringed by the common law policy of a state whereby peaceful persuasion through picketing is declared to be tainted with illegality in the absence of an immediate employment relationship between the disputants.

Rehearing is now requested by the respondents upon the sole ground that this Court may not interfere with the injunction of a state court which purports to be based upon a violation of the labor policy of that court, regardless of whether a question of freedom of speech under the Federal Constitution is involved. It is earnestly believed that the mere statement of this proposition is its own refutation, and accordingly we shall not deal with it at great length. In view of the importance of the subject at issue, however, we avail ourselves of the opportunity briefly to reply to the respondents' contentions.

II. No substantial ground for rehearing has been shown to exist; a state court may not circumvent the guarantees of the Federal Constitution by declarations of local policy.

Analysis of the respondents' application for rehearing promptly discloses that it is based upon a single ground, namely, that this Court should not have interfered with the injunction of the State Court because that injunction was purportedly based upon a policy of the State Court to the effect that peaceful picketing, for the purpose of seeking employment, by one who operates his business without employees, is "illegal".

This alleged ground for rehearing is not now presented to this Court for the first time; it was precisely upon the refutation of this argument that the petitioners' original brief was based, and upon which it is believed the decision of this Court was rendered.

The proposition argued by the respondents seeks to hoist itself by its own bootstraps. To argue that the Court of Appeals of the State of New York interferes with labor activities only when the object of the labor organization is illegal and that the legality of the object under consideration by the Court is determined by the Court alone, is to beg the entire question. This Court has not hesitated

to strike down interferences with the Constitutional guarantee of the freedom of speech, even when such interferences have been the result of legislative acts (*Thornhill v. Alabama*, 310 U. S. 88; *Carlson v. California*, 310 U. S. 106).

The essence of the Constitutional guarantee of freedom of speech is that it protects every variety of utterance, desirable or undesirable as it may seem to the local authorities. The guarantee is utterly futile, if it is construed merely to assure that the utterance of that which is currently acceptable to constituted state authority will be permitted. Such an assurance is vouchsafed by any despotism. The Constitution of a democracy which guaranteed no more would indeed disgrace democracy. The test of the validity of the Constitutional guarantee is specifically whether it assures that unpopular utterance will be permitted, so that men will today feel free to speak the unpleasant words which, wisely or foolishly, they hope will become the law of the land tomorrow. Fine-spun qualifications of this basic concept lead to its utter destruction. Once a small inroad has been made into the territory of freedom of speech, once the defenses have been encircled, the entire territory is doomed. If the use of the term "illegal" by a state court is deemed automatically to confer upon its decisions a sacred immunity from review upon Constitutional grounds, there will remain no area of utterance whatever which is free from invasion.

It has always been freely acknowledged by the petitioners that criminal or tortious conduct, disguised as an exercise of the privilege of free discussion, is patently without the protection of the Constitutional guarantee. Thus, when attempts have been made to use the privilege as a cloak for obscenity, for violence or for fraud, this Court has promptly declared that the Constitutional guarantee is inapplicable. In such cases the claim of the privilege amounts to a fraud upon the Court, for there is primarily involved a specific criminal or tortious act, and

the use of speech is merely secondary and subservient to such act.

The power and duty of the Court to strike down such subterfuges is not, however, to be misunderstood. A state court may not, while purporting to exercise that power, arrogate to itself the additional authority to curtail freedom of discussion by arbitrarily affixing thereto the label of "illegality". In the case at bar, there was neither violence, nor fraud, nor disorder, nor coercion, nor threat thereof. The Trial Court explicitly found:

"52. That such picketing as occurred herein was conducted without any violence whatsoever or threat of violence" (R. 55).

"53. That such picketing as was conducted herein was in no respect disorderly" (R. 55).

"54. That the placards used by the pickets were accurate and at no time was there any misrepresentation or misstatement made either through placards or oral statements" (R. 55).

"75. That what was done by the defendants and, as heretofore mentioned, was done in a peaceful and orderly manner" (R. 59).

To label peaceful utterance, under such circumstances, "illegal", in order to justify suppression thereof, because the state court happens to disapprove of the Union's objective is merely an attempt to rationalize a violation of the Constitution.

Neither state courts, nor state legislatures are free, under our Federal Constitution, to dictate the circumstances under which freedom of speech may be exercised. "Unlawful objectives", whether in the field of labor relations or elsewhere, may not be judicially created for the purpose of justifying encroachment upon the Constitution privilege. Use of the term "illegal" bestows no sanctity upon legislative or judicial censorship.

There can no longer be any doubt that in attempting to brand as "illegal" and prohibit peaceful picketing by labor unions in situations wherein the ~~Constitutional~~ employment relationship did not happen to exist, the Court of Appeals of the State of New York infringed upon the Constitutional guarantee of freedom of speech. That the Court had embarked upon a dangerous and unauthorized course, which, if followed, would inevitably lead the Court to assume complete dictatorial supervision of labor organizations, was subsequently demonstrated by the language of the majority of that Court in the case of *Opera on Tour v. Weber*, 285 N. Y. 348:

Conventional

"For a union to insist that machinery be discarded in order that manual labor may take its place and thus secure additional opportunity of employment is not a lawful labor objective. In essence the case at bar is the same as if a labor union should demand of a printing plant that all machinery for typesetting be discarded because it would furnish more employment if the typesetting were done by hand. We have held that the attempt of a union to coerce the owner of a small business, who was running the same without an employee, to make employment for an employee, was an unlawful objective and that this did not involve a labor dispute (*Thompson v. Boekhout*, 273 N. Y. 390). So, too, in a case just unanimously decided, we held that it was an unlawful labor objective to attempt to coerce a peddler employing no employees in his business and making approximately thirty-two dollars a week, to hire an employee at nine dollars a day for one day a week (*Wohl v. Bakery and Pastry Drivers*, 284 N. Y. 220)" (285 N. Y. 348, 357).

The minority of the Court of Appeals in that case recognized the danger in the policy of the Court and the violation of the Constitution which it involved, and the Chief Judge, in dissenting, forcefully stated that the injunction approved by the majority constituted

"* * * an intrusion by the Court into a field from which it is excluded under the law of the State as

formulated in an unbroken line of judicial decisions, by statute of the Legislature, and by the Constitution * * * " (285 N. Y. 348, 366).

It is noteworthy that the majority of the New York Court of Appeals has finally recognized the significance of the decisions of this Court in *American Federation of Labor v. Swing* and in the case at bar, as is shown by the recent decisions of the Court of Appeals in the cases of *People v. Bergstein*, N. Y. , and *People v. Muller*, N. Y.

(not yet officially reported; both decided July 29, 1941). The soundness of the decision of this Court in the case at bar is beyond reasonable question. No substantial ground for rehearing has been set forth in the respondents' papers. It may fairly be stated that if the decision of this Court had been otherwise, the vitality of the most important provision of the Constitution of the United States would have been utterly destroyed.

CONCLUSION

The application for rehearing should be denied.

Respectfully submitted,

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